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LIABILITY FOR WASTE.

I.

AT COMMON LAW.

If the principle of authority has any place in the law—a proposition open to serious question—it is surely pushing it too far to recognize its binding force in matters of history. The great name of Lord Coke may, indeed, lead us, even while, with the rest of the profession, we wonder,¹ to accept the strange reasoning of *Dumfries's Case*,² to follow, however reluctantly, the lead of *Spencer's Case*,³ to acquiesce in the doctrine, fathered by him, that upon the dissolution of a corporation its lands revert to the donor instead of escheating to the lord of whom it is held,⁴ but it cannot require us to accept unquestioningly his statements as to the law of an earlier day. It is in this uncritical spirit that the profession has always accepted Coke's description of the law of waste before the enactment of the Statute of Marlbridge.⁵ It is true that some of his statements have received a broader interpretation than they will bear. The celebrated passage in the Commentary upon Littleton,⁶ in which he declares that the writ of waste did not lie against the lessee for life or years before the Statute of Gloucester,⁷ commonly interpreted as an assertion that the common law afforded no protection against waste by tenants for life or years, is merely a statement of the indisputable fact that the writ of waste, which was framed on the statute and, as he says, was created by it, did not lie before the statute. So where, in his commentary on the Statute of Marlbridge,⁸ he says that "against lessees for life or

¹ *Per* Mansfield, C. J., in *Doe v. Bliss* (1813) 4 Taunt. 735.

² (1603) 4 Co. 119, b. ³ (1583) 5 Co. 16, a.

⁴ Co. Litt. 13, b; Gray, *Perpetuities*, §§ 44-51; 2 Harv. L. R. 163, 164.

⁵ (1267) 52 Hen. III, c. 23, § 2. ⁶ Co. Litt. 54, b.

⁷ (1276) 6 Edw. I, c. 5. ⁸ 2 Inst. 145.

years there lay no prohibition of waste at the common law," he is obviously speaking only of that extraordinary process of the early law whereby the courts of common law by writ of prohibition anticipated the remedy by injunction with which the court of chancery was later to make us familiar. Again, in *Bowles's Case*,⁹ Coke, then chief justice, reiterates the statement that "a prohibition of waste lay against tenant in dower and by the curtesy at the common law and not against the lessees till the said Statute of Marl.," and makes it clear that he is referring to the remedy and not to the legal quality of the act by quoting from Bracton a well-known passage¹⁰ defining the rights of the conventional tenant for life, and adding, "which proves directly that it was a wrong in the lessee for life to do waste or destruction at the common law."

Thus far our authority has said nothing to indicate that the lessor was wholly without remedy at common law for waste committed by an ordinary tenant for life or years, while his comment on Bracton would seem to intimate that some remedy did exist in such cases. The common law armory has other weapons of offense and defense than writs of prohibition and waste. But it soon appears that Coke uses the phrase "it was a wrong," in the quoted passage, in the sense of Bracton's expression, "*fecit transgressionem*," not as furnishing grounds for an affirmative remedy against the wrongdoer, but as a basis for denying him a remedy against the injured lessor. Thus it may be conceded that a lessee for life could not, even at common law, make himself the owner of timber trees cut down by him without authority of his lessor¹¹ or that a lessee who has been evicted for abusing the freehold should not have an assize to reinstate him in the seisin,¹² without assuming as a necessary or even probable consequence that the lessor might have stayed the waste by writ or that the law supplied him with the means of recovering the place wasted and damages for the waste committed. It is a truism that every legal wrong has a legal remedy—else it were no wrong—but it by no means follows that the remedy provided by the law is proportioned to the wrong done. Elsewhere, however, our author becomes more explicit. In his exposition of the Statute of Marlbridge, previously referred to, he supplements his statement that prohibition of waste did not lie against lessees for life or years at the common law by the addi-

⁹ (1615) 11 Co. 79, 82.

¹⁰ Bk. IV. f. 217.

¹¹ *Bowles's Case*, *supra*.

¹² Bracton, *ubi supra*.

tion,¹³ "because they come in by the act of the lessor, and he might have provided upon the making of the lease against waste to be done, and he that might and would not provide for himself, the common law would not provide for: otherwise it is of -estates created by law," etc.; and in his commentary on the Statute of Gloucester he says,¹⁴ "At the common law waste was punishable in three persons, viz.: tenant in dower, tenant by the curtesie and the guardian, but not against tenant for life or tenant for yeares, and the reason of the diversity was," etc.—giving the same reason as in the preceding passage. We may conclude, therefore, with some degree of confidence that Lord Coke really entertained the opinion, which has been attributed to him and reiterated with scarcely a dissenting voice¹⁵ by numberless writers since his time,¹⁶ that prior to the Statutes of Marlbridge and Gloucester the common law afforded no affirmative remedy for waste, either by prohibition, forfeiture of estate or action for damages, against a lessee for life or years.¹⁷

It requires a greater measure of confidence to declare that Coke was wrong in his opinion, but the evidence to that effect, though slight in quantity, is conclusive.

Bracton's authority, cited by Reeves,¹⁸ is, indeed, not conclusive, though his reference to a waste so small in amount (*ita modicum*) that an inquest ought not to be held about it,¹⁹ indicates the existence of a process involving an inquiry into the alleged waste, and, perhaps, an assessment of damages against a life tenant. But that the commission of acts of waste by the ordinary tenant for life was a wrong, and that it put him in a measure outside the law's protection so far as his freehold was concerned, Bracton makes clear. In such case the chief lord, or, it would seem, "any one who has an interest in the matter, as a relative or a friend," may disseise the injurious tenant and hold the land until he has made full satisfaction for the waste committed and given security not to make further waste.²⁰ But the cases to which Bracton had access,

¹³ 2 Inst. 145. ¹⁴ 2 Inst. 299.

¹⁵ 2 Reeves' Hist. Eng. Law, 73; 2 Poll. & Mait., Hist. Eng. Law, 9.

¹⁶ Fitz. Nat. Brev. 55; Doct. & Stud. II. c. 2; 2 Bl. Com. 282; Bewes, Waste, I. 2.

¹⁷ See also *Countess of Shrewsbury's Case* (1600) 5 Co. 13.

¹⁸ 1 Hist. Eng. Law, 386. ¹⁹ Bract. f. 316, b.

²⁰ Bract. f. 169, 217; Britt. 113, b. This seems to have been an early and, later, a frequent mode of redress. See *Lacey v. Malet* (1203) 2 Sel. Civ. Pleas 144: a case of waste by a guardian.

and which have now through the labors of Professor Vinogradoff and Professor Maitland been made accessible to us also, demonstrate that the inference suggested by his remark about an inquest, quoted above, is equally conclusive. While most of the cases of waste which have come down to us from the first half of the 13th century have to do with the wrongdoing of tenants in dower, and, somewhat less frequently, of tenants in chivalry, there is nothing to indicate that the same remedies employed against these tenants were not equally available against ordinary tenants for life. Though the terms in which the "conventional" tenants of that day were described, "*qui habet ad terminum*," "*qui tenet ad firmam*,"²¹ were equally applicable to tenants for life and for years, it may perhaps be assumed that the "termor," as tenant for years came to be called, had not yet reached the dignity and importance of being subjected to writs of prohibition and the like. Though his possession had come to be protected in the king's court against wrongful eviction by his lessor, his ordinary rights and obligations were probably still defined and enforced in the manorial courts. But for the life-tenant, whether legal or conventional, there was one law of waste, one forum, one and the same process.

This may seem too confident a statement when the meagre evidence is spread before the reader. But it will be borne in mind that the judicial records of the period under examination are still for the most part buried in inedited and unpublished manuscript rolls; that the collection of cases given to the world a few years ago under the description of "Bracton's Note Book," which is our principal source of information, is a fragmentary selection of decisions of two judges only—Pateshull and Raleigh—and covers a period of less than a quarter of a century (1217-1240); that the cases include the entire field of the common law of the 13th century, of which the law of waste constitutes but a very small part. We shall not, therefore, draw any unfavorable conclusions as to the state of the law of the subject if we find but few cases dealing with it. A single ray of light out of the darkness will illumine it.

The Note Book contains twenty-five cases dealing with waste, five of which concern ordinary tenants for life. The first of these is the case of Matilda de Gatesdena,²² who was attached at the suit of Ranulf de Gatesdena for committing waste in lands which she held only as tenant for life (*quas non habet nisi ad vitam suam*

²¹ Bract. N. B. 607, 691, 1304.

²² Bract. N. B. 443, 540.

tantum), in violation of a fine made between them before the justices, etc. An inquest was directed which found waste to a small amount, whereupon the said Matilda was adjudged to be in mercy and to pay the amount of the waste to the said Ranulf and to give pledges that she would commit no more waste.

The next case is that of Peter Pejure,²³ cited by Bracton,²⁴ who held the lands "*ad terminum*" and who was attached to answer Nicholas Creusquer for waste, and because the waste was of so small value (*de tam parva re*) the case was dismissed, but a prohibition issued forbidding Peter to commit any further waste.

The third case is that of Thomas de Haya,²⁵ attached at the suit of John de Bello Campo for waste done in lands which the said Thomas held *ad firmam* of the said John; but the case abated, owing to the fact that defendant, by claiming the fee, raised a question of title, which could not be tried in an action of waste.

The case of Robert de Hastings,²⁶ attached for waste at the suit of Thomas, son of Godfrey, does not disclose the nature of the tenancy, but it can have been neither dower nor wardship, and was probably not curtesy. The waste being traversed, an inquest was ordered.

Our last case is that of Robert de Corneville,²⁷ summoned before the justices of the King's Bench to answer the complaint of Richard of Elmham for waste committed by him *contra consuetudinem Angliæ* in lands which the said Robert held of the said Richard for life (*ad terminum vite*). Both parties having put themselves upon the country, an inquest was ordered.

Here then we have the whole range of cases in which the action of waste was available—*contra finem*, *contra conventionem*, *contra consuetudinem Angliæ*—and all the usual remedies and process: writ of attachment, inquest, judgment for the amount of the waste, pledges by the tenant and prohibition. There seems little ground, therefore, for the conclusion of the learned authors of the History of English Law that "it seems probable that in the past a tenant for life has been free to use and abuse the tenement as pleased him best," or for the suggestion that "The alleged wrong is not that of committing waste, but that of committing waste after receipt of a royal prohibition."²⁸

²³ N. B. 607.

²⁴ Bract. f. 316, b.

²⁵ N. B. 691.

²⁶ N. B. 718.

²⁷ N. B. 1304, 1371; s. c. Fitz. *Wast.* 140.

²⁸ 2 *Poll. & Mait.*, 9. The references (Bract. f. 315; Bract. N. B. 574) are to cases of waste by dowress.

It is a curious fact that the only tenant whose rights in the land in the matter of waste are left indeterminate by the authorities is he who holds by the law of England. It is true that Lord Coke in his Commentary on Littleton,²⁹ as well as in his notes on the Statute of Gloucester,³⁰ includes the tenant by the curtesy among those liable for waste at common law, by reason of the fact that, like tenant in dower and guardian, he comes to his estate by operation of law; but in the notes on the Statutes of Marlbridge he omits him from this category,³¹ a fact which has led some later writers to doubt whether the liability of tenant by the curtesy was recognized by the earlier law. In corroboration of this doubt we may note that Bracton, though treating fully of tenancy by the curtesy, does not mention the tenant's liability for waste,³² and that among the cases abstracted in the Note Book, there is not a single one in which he figures. It is significant, too, that in the famous compilation of Norman law, the *Très Ancien Coutumier de Normandie*, made at the beginning of the thirteenth century and representing a legal system almost identical with that described by Bracton a half century later, the liability of dowress³³ and guardian in chivalry³⁴ for waste committed by them is plainly declared, but there is no reference to a similar liability on the part of tenant by the curtesy. It would, of course, be easy to overestimate the importance of these omissions. At the best, they furnish only negative evidence, and, in case of the *Coutumier*, it may be remarked that a legal treatise which does not deem the tenant by the curtesy of sufficient importance to treat of him could not be expected to discuss his liability for waste.

On the other hand, may it not be that, in grouping tenant by the curtesy with tenant in dower and guardian, and inferring his liability for waste from the resemblance of his estate to theirs, we are belittling his importance in the feudal law of property? We do, indeed, speak of him as a tenant for life, but it must be remembered that his tenancy by the curtesy is the projection of a real seisin in fee, and that the operation of the law in his case is not, as in the case of dower and wardship, to confer upon him an estate

²⁹ Co. Lit. 53, a. ³⁰ 2 Inst. 299.

³¹ 2 Inst. 145. And see Fitz. Nat. Brev. 55, c.

³² Except in one place (f. 169) where he denies him the right to an assize of *novel disseisin*, if excluded by the lord for waste. See *supra*.

³³ Cap. LXXIX, *De Dotibus*, § 9.

³⁴ Cap. XI, *De Custodia Orphanorum*, § 2.

for life, but to cut down his fee to a life estate. During coverture, while jointly seised with his wife of an estate of inheritance, there was nothing to prevent him from using the lands as he saw fit, and there is no *a priori* reason for believing that, upon the death of his wife, he would be subjected to any greater restraint in its use than was imposed upon him before that event. His position in this respect is not unlike that of tenant in special tail, whose fee has, by force of circumstances, become in point of duration no more than a life estate, but remains unaltered in quality. Words are forces in law, and the effect of describing the estate of tenant by the curtesy as a life estate will ultimately be to subject it to the ordinary incidents of the life estate; and it is, therefore, not improbable that tenant by the curtesy came in the course of the common law to be impeachable of waste. But if this result was in fact reached, it was not because his estate was like those of guardian and tenant in dower, nor yet, as Coke asserts, because it came to him by operation of law, but because he had come to be regarded as a tenant for life, and tenants for life were subject to the penalties of waste.

If the conclusions indicated in this study of the feudal law of waste are correct, the time is ripe for legislation. There is, indeed, no lack of power in the king's court, and this power is exercised through a varied and elastic procedure, but waste is rampant and the penalties of the law are too mild to check it. Moreover, it is a period of industrial and social transformation, with whose changes the courts cannot keep pace. There has already been legislation to regulate the relations to their lords of a new class of land-holders, to be known as "termors," who occupy the land, not as freeholders but for a definite term, and there will shortly be more legislation to protect them against the aggressions of strangers. These termors are apparently a robust class of persons, insistent on their rights and usually free men, if not freeholders—men neither too squeamish nor too timid to waste the lands committed to them, and, moreover, protected by the new legislation from interference by the lord with their wrongful acts.

If there is no law of waste for these men, such law must be made without delay. It is not important, at least it is not possible, to determine whether Thomas de Haya, who held certain lands of John de Bello Campo *ad firmam*, and who was convicted of waste in the 16th year of Henry III³⁵, was or was not a termor.

³⁵ Bract. N. B. 691; *supra*, p. 429.

Tenants for life might also hold *ad firmam*. There is no other evidence that tenants for years were held liable for waste, and it was not to be expected that they should be. The courts move slowly in the process of adjusting the old rules to new conditions and in 1267, when the Council stepped into the breach, the writ *quare ejicit infra terminem* was only thirty years old, and the position of the termor had scarcely become recognized as being in the nature of a tenancy at all. Between it and the freehold there was a deep gulf fixed, and it required something more than judicial insight to see that what was law for the one was law for the other.

It is in this condition of affairs that we find the key to the provision regarding waste in the Statute of Marlbridge. Its language, in Coke's translation, will bear repeating, viz.: *Also fermors during their terms shall not make waste, sale nor exile of house, woods and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage and shall be punished by amerciamment grievously.*³⁶

Who are the fermors (*firmarii*) at whose wrongdoing the statute is aimed? Coke says,³⁷ "all such as hold by lease for life or lives, or for years, by deed or without deed," and he quotes, as applicable to the word *firmarii*, Bracton's observation on *terminus*, that it is to be liberally construed (*large se habet*) so as to include a term for life as well as a term of years (f. 318). But while Bracton is clearly right in his interpretation of the word *term*, Coke appears to be wrong in placing a similar construction on *fermor*. Bracton himself uses the term *firmarius* only of one who holds a tenement for a term of years, and, in a well known passage in his chapter on the writ, *quare ejicit* (f. 220, b), he compares the position of the *firmarius* with that of the freehold tenant in such a way as to make them mutually exclusive.³⁸ It is true that the term *firma*, variously translated "ferm" and "farm," whether employed as a noun or a verb, is used for tenancy for life as well

³⁶ Stat. Marl. 52 Hen. III. c. xxiv. *Item firmarii tempore firmarum suarum vastum, venditionem vel exilium non facient de domibus, boscu vel hominibus, nec de aliquibus ad tenementa quæ ad firmam habent spectantibus*, etc.

³⁷ 2 Inst. (Stat. Marl.) 145, (1).

³⁸ *Non magis poterit aliquis firmarium ejicere de firma sua quam tenentem aliquem de libero tenemento suo.* Bract. f. 220, b. See also, *ibid.* f. 318.

as for years; but not so the word *firmarius*. In brief, tenant for life as well as tenant for years may hold lands to farm, but only the tenant for years is a farmer. This interpretation of the term employed in the statute is confirmed by the Register in a passage which may be adopted as a final construction of the provision in question.³⁹ The effect of the statute was not to limit or define the action of waste, nor to render its penalties more definite and certain, nor to provide any new procedure for its repression or punishment, nor yet to extend it to any class of life tenants not previously subject to it, but only to bring the fermor, the new tenant for years, within its operation. This was enough for it to attempt, and this it achieved.

That the penalties of waste were not affected by the Statute is apparent when its language⁴⁰ is compared with the terms in which the prohibition of waste is couched in the rules and decisions of the feudal law. Thus in the *Summa de Legibus Normanniæ* it is provided that the lord committing waste in his ward's land shall be grievously amerced (to use Coke's translation once more) and make full restitution,⁴¹ and in the Note Book the judgment, when given, usually declares the injurious tenant to be in *misericordia*.⁴² There is no doubt that he, who, through disobedience of the royal prohibition, has come into the king's mercy, might and often was compelled to redeem himself by a grievous amercement, but in practice the forfeiture for waste seems generally to have been limited to the amount of the damage caused. At the best, it was indefinite and uncertain. The anonymous author of *The Mirrour of Justices*, who found the legal world of his time so sadly out of joint, condemns the statute for its mildness; "for waste," he says, "is a personal trespass and requires a personal punishment and not a simple amercement."⁴³

It was to remedy this defect of the common law that the Statute of Gloucester, Cap. V, was enacted.⁴⁴ This it did, first, by

³⁹ *Et sciendum quod per statutum de Marlbridge, cap. 22, data fuit quædam prohibitio vasti versus tenetem ad terminem annorum.* Regist. Brev. 72.

⁴⁰ "Quod si fecerint * * * dampna plena restituant et per misericordiam graviter puniantur." Stat. Marl. cap. xxiv.

⁴¹ "Graviter debet emendare et plene restituere." *Contumiers de Normandie*, vol. II, cap. xxxi. *De Custodia*, 16.

⁴² Bract. N. B. 56, 540. The judgment does not generally appear.

⁴³ *Mirrour*, c. v, § 3: Of the Statutes of Marlbridge.

⁴⁴ (1278) 6 Edw. I.

providing a new process, the writ of waste, and, second, by affixing to the offense a severe and definite penalty, viz.: forfeiture of the place wasted, and thrice the amount of the damage committed. The statute enumerates the various classes of tenants who were thenceforth to be subject to the new action and its penalties, "him that holdeth by law of England or otherwise for term of life or for term of years, or a woman in dower." It does not, therefore, enlarge the number of persons subject to impeachment of waste, unless, indeed, as Coke himself suggests,⁴⁵ tenant by the curtesy may now for the first time have come under restrictions in this respect.

It is not too much to say that the institution of the new process was an event of the first importance in the history of the law of waste. Its directness and simplicity, perhaps also its inflexible and drastic character made it a favorite remedy and tended in course of time to give definiteness and stability to the relation of landlord and tenant. It must have done much to promote the letting and improvement of lands. It is true that it substituted a rigid, inelastic procedure for the flexible process of the common law, but this was not an unmixed evil. There is a stage in legal development when definiteness and certainty, even in matters of procedure, are the first requisites of law, and that stage had now been reached in the common law system. The crystallization of the procedure in waste was only an example of what was happening in every other department of law. It is doubtless true, as Coke says,⁴⁶ that the writ of prohibition was still available to the lord against a wasting tenant, but it is probably also true that it was seldom resorted to and soon fell into desuetude. It was to be many years before this excellent remedy,⁴⁷ in another court and under another name, was to be employed to restrain the commission of acts of waste, but the new action instituted by writ framed on the Statute, providing amply for compensation and by its terrors exercising a wholesome restraint upon the tenant, held undisputed sway for four hundred years, and was not completely superseded until another century had been added to its span of existence. It is a commonplace that legal institutions are among the most persistent of human creations, and forms of procedure have often displayed an astonishing vitality in our own as well as in other legal systems,

⁴⁵ 2 Inst. 301, pl. 3.

⁴⁶ 2 Inst. 299.

⁴⁷ See Lord Coke's praise of it: 2 Inst. *loc. cit.*

but the "perdurableness" of the action of waste is notable even among legal institutions. Such a process, with its stern and inflexible penalties and with such a history, can hardly fail profoundly to modify a body of law which had been developed under a milder régime.

To examine in detail the influence of the Statute of Gloucester on the law of waste would be to write a treatise on that branch of the law. Within the limits of an article such as this only one aspect of its operation can be considered—its effect on the doctrine of permissive waste.

We have Coke's authority for the statement, fully borne out by the cases, that "neither this act nor the statute of Marlbridge doth create new kind of wastes, but do give new remedies for old wastes: and what is waste and what not, must be determined by the common law."⁴⁸ The authorities prove abundantly that at the common law tenant was liable for permissive as well as for voluntary waste. Most of the cases, it is true, are concerned with acts of destruction, such as the cutting and sale of trees, the pulling down or removal of houses, and the like, by the tenant, but there are interesting and significant instances of the other sort. Thus in the case of *Walter de la Sauceye vs. John de Cestria*,⁴⁹ the waste was twofold, cutting and carrying off timber and permitting buildings to fall down (*et permittit decidere domos*) which should have been kept up (*sustentari*). In another case, *Royesia de la Dene*,⁵⁰ a guardian in chivalry, was required to restore a kitchen which was burned in her time, two farm buildings (*veteres grangias*) which had collapsed for want of repair (*pro defectu sustentationis*) and to repair all other buildings on the premises, and was prohibited from causing any further waste. In the case of *John Sanford vs. Cecilia Sanford*,⁵¹ a dowress was held to answer for having permitted a fish-pond and mill to go dry (*molendinum omnino desiccatum est et fractum et vivarium similiter*). From the language of the writ it is apparent that the defendant was charged with no act of destruction, but only with failure to repair, and from her plea that the want of water was due to the drought of summer, it

⁴⁸ 2 Inst. 300, 301. A good instance is furnished by an anonymous case, (1309) 3 Edw. 1, pl. 49, holding that tenant in dower can be made to answer for exile of folk, although there is no mention of exile in the Statute of Gloucester, c. 5.

⁴⁹ Bract. N. B. 739.

⁵⁰ *Ibid.* 1165: s. c. Fitz. *Wast.* 139.

⁵¹ Bract. N. B. 1617.

is plain that her obligation to repair was fully recognized. It is noteworthy that this early jurisdiction *in personam*, which we to-day call equitable, then exercised by the king's court, not only took on the form of a mandatory injunction, as in the case of Royesia de la Dene, above referred to, but was apparently employed in the Sanford case to restrain permissive waste,⁵² a jurisdiction which our courts of equity have refused to assume.

It is not necessary to multiply instances of the recognition of permissive waste at the common law. The fact that cases of such waste were frequent in the early history of the new procedure,⁵³ and were dealt with as a matter of course, indicates that it was no new thing, and on this point Coke's authority is unimpeachable. What is to be noticed is the fact that in the early law, whether before or after the statute, no distinction is made between the decay and deterioration of the premises from the silent effects of time, the neglect which permits the sea to rush in and engulf a marsh or meadow, and the harm suffered through the wilful or negligent acts of wrongdoing of a stranger. All are equally imputed to the tenant, and, under the common description of permissive waste, are equally obnoxious to the statute as to the custom of the realm on which the earlier writs were founded.⁵⁴

In fact, the tenant, as to the lands entrusted to him, has, like the common-carrier and the inn-keeper with respect to the goods entrusted to them, become a virtual insurer, save against the act of God and the public enemy. It is true that the nature of this liability is not always recognized and that the tenant's default is sometimes stated in terms of negligence; as *per* Willughby, C. J., in an anonymous case reported in Fitzherbert,⁵⁵ where the burning of a kitchen by a stranger during the tenant's absence was adjudged waste "for want of a good watch," and in the puzzling case in 21

⁵² The point is not clear; the prohibition may have been intended only for acts of voluntary waste, which were also found by the inquest.

⁵³ A few cases arising under the statute may be given: Y. B. (Rolls Ser.) 18 Edw. III, 40 (leaving a house uncovered); Y. B. (Rolls Ser.) 17 & 18 Edw. III, 339 (permitting a sea-wall to fall out of repair); Y. B. 11 Hen. VI, 1 (failure to protect a wood against cattle); Y. B. 10 Hen. VII, 5 (leaving a mud-bank unprotected); Owen, 43 (neglect to clean ditch); Moore, pl. 173, 187, 200 (failure to repair river-bank and sea-walls); Cro. Car. 381, pl. 9 (permitting walls to decay for want of plastering); Fitz. Nat. Brev. 60, g (waste done by a stranger); Y. B. 11 Hen. VI, 1 (waste by a stranger).

⁵⁴ The usual form of the writ is *vastum fecit contra consuetudinem regni*.

⁵⁵ (1345) Fitz. Abr. *Wast.* pl. 30.

Edw. I,⁵⁶ in which the sheriff was directed to inquire whether an accidental fire was due to the default of the tenant or not. But the default of the tenant in these cases is obviously not his failure to reach the ordinary standard of diligence, but rather his neglect of those precautions which avail to avert all casualties save those due to the elements and to war. The fact that no case is to be found in which due care was pleaded by tenant accused of permissive waste, coupled with his unquestioned liability for the consequences of non-repair of palings, houses and river-banks, seems conclusive on this point. In short, the custom of the realm not only required of him that he "should do no waste himself," but also "that he should suffer none to be done."⁵⁷

The foregoing recital brings the history of waste down almost to the time when a new remedy, based on milder principles, will supersede the writ instituted by the Statute of Gloucester as completely as that had superseded the process of the earlier law. But as yet there is no amelioration of the lot of the tenant, whether the waste imputed to him be voluntary or permissive, whether due to his default or to the wrongful act of another. The definition of waste remains unchanged. The custom of the realm still governs. Lord Coke's words are still true, that "what is waste and what not, must be determined by the common law."

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⁵⁶ Y. B. (Rolls Ser.) 21 & 22 Edw. I, 29.

⁵⁷ Doct. & Stud. II, c. iv.